

Rule 13, Ariz. R. Crim. P.

INDICTMENT AND INFORMATION: Rule 13.5 (b), Ariz. R. Crim. P., amending the charging document to conform with the evidence presented; limits.....Revised 11/2009

Rule 13.5(b), Ariz. R. Crim. P., states:

b. Altering the Charges; Amendment to Conform to the Evidence. The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

The Comment to this subsection explains that the charging document may always be amended with the defendant's consent, as is often done as part of a plea agreement. The Comment further provides:

The charging document is automatically amended to conform to the evidence adduced in the course of the proceedings; no motion or formal action is required.

Despite this broad "automatically amended" language, due process prohibits any amendment to the charging document that changes the nature of the offense or prejudices the defendant in any way. "Because the elements of the amended charge differ from those of the original charge, . . . the amendment changed the nature of the offense and therefore violated Rule 13.5(b)." *State v. Freney*, 223 Ariz. 110, 219 P.3d 1039, 1040 (2009). "[A]n amendment proposed mid-trial that changes the nature of the original charge deprives the accused of the type of notice and opportunity to prepare a defense contemplated by the Sixth Amendment and is therefore not permitted by Rule 13.5(b)." *State v. Sanders*, 205 Ariz. 208, 211, 68 P.3d 434, 437 (App. 2003). "[A]mending an

indictment to conform to the evidence is subject to limitations to protect a defendant's constitutional rights." *State v. Delgado*, 174 Ariz. 252, 254, 848 P.2d 337, 339 (App. 1993). In *State v. Barber*, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982), the Court of Appeals explained:

In determining the propriety of an amendment to an indictment to conform to the evidence, this court must consider whether the allowing of that amendment would violate two important rights of the defendant, to wit: (1) the defendant must have been put on notice of the charges against him with an ample opportunity to prepare to defend against them; and (2) the acquittal of the amended charge must provide a double jeopardy defense to a subsequent prosecution on the original charge.

To put it another way, if there is a variance between the charging document and the proof presented at trial, "[i]n order to constitute reversible error, a variance must not only exist, but it must affect the substantial rights of the parties such that it is prejudicial." *State v. Schneider*, 148 Ariz. 441, 446, 715 P.2d 297, 302 (App. 1985) [holding that in fraudulent schemes/theft trial, the State could present evidence from fraudulent schemes victims who were not alleged as theft victims). In *State v. Stough*, 137 Ariz. 121, 123, 669 P.2d 99, 101 (App. 1983), the defendant was charged with kidnapping under one subsection of the kidnapping statute, but the evidence presented at trial showed that he committed that crime under a different subsection. The trial judge instructed the jury on the latter subsection and the defendant was convicted. On appeal, he argued that the trial court erred by instructing the jury on a different theory than the one under which he had been charged. The Court of Appeals found no error, reasoning that the facts as charged and the facts of the actual offense were just different ways of committing the same crime of kidnapping.

Striking superfluous information from the indictment also does not change the nature of the offense. *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994) [holding that the defendant was not prejudiced when State amended theft over \$1000 charge to theft of a motor vehicle and struck allegation of value]; *State v. Olea*, 182 Ariz. 485, 490, 897 P.2d 1371, 1376 (App. 1995) [when defendant was charged with use of cocaine, defendant was not prejudiced when State struck superfluous allegation of amount of cocaine; the superfluous allegation did not change the nature of the charge].

“[A] technical or formal defect in a charging document may be remedied whenever such defect is presented.” *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). The State should make its motion to amend as soon as grounds for amendment become evident, and, in any event, before the State rests its case. In *State v. Johnson*, 198 Ariz. 245, 249, ¶ 13, 8 P.3d 1159, 1163 (App. 2000), the Court of Appeals found that the defendant was prejudiced when the trial court allowed a change to the charging document after the State had rested.

Some amendments to conform to the evidence that have been held to be technical, not substantive, are: changing the date of the offense, *State v. Bruce*, 125 Ariz. 421, 610 P.2d 55 (1980) and *State v. Jones*, 188 Ariz. 534, 937 P.2d 1182 (App. 1996); correcting the address of a burglarized place, *State v. Suarez*, 106 Ariz. 62, 470 P.2d 675 (1970); correcting an indictment that improperly alleged that the defendant attempted to commit a reckless act, *State v. Delgado*, 174 Ariz. 252, 848 P.2d 337 (App. 1993); substituting a correct statute number for an erroneous one, *State v. Dungan*, 149 Ariz. 357, 718 P.2d 1010 (App.

1986); adding an omitted statute number, *State v. Bishop*, 137 Ariz. 361, 670 P.2d 1185 (App. 1983); adding an omitted citation to a DES regulation, *State v. Fullem*, 185 Ariz. 134, 912 P.2d 1363 (App. 1995); correcting a duplicitous indictment to allege only one offense, *State v. Olea*, 182 Ariz. 485, 897 P.2d 1371 (App. 1995) and *State v. O'Haire*, 149 Ariz. 518, 720 P.2d 119 (App. 1986); correcting the name of the robbery victim from that of the business to that of the person who was robbed there, *State v. Sowards*, 147 Ariz. 185, 709 P.2d 542 (App. 1984); correcting the name of the victim corporation, *State v. Barber*, 133 Ariz. 572, 653 P.2d 29 (App. 1982), *approved*, 133 Ariz. 549, 653 P.2d 6 (1982); and correcting an indictment that referred to the defendant's having *committed* a prior offense rather than having been *convicted of* that offense, *State v. Woodall*, 155 Ariz. 1, 744 P.2d 732 (App. 1987).

The defendant bears the burden of showing that he has suffered actual prejudice from an amendment to the charging document. *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996). However, if an amendment changes the nature of the offense, prejudice is presumed. *State v. Sanders*, 205 Ariz. 208, 214, 68 P.3d 434, 440 (App. 2003).

An example of a non-technical, prejudicial defect was presented in *State v. Sammons*, 156 Ariz. 51, 749 P.2d 1372 (1988). In that case, after the grand jury indicted the defendant for theft and robbery offenses, the State amended the indictment to allege that he had committed those offenses while on parole in a Pima County case. After his trial and conviction, a hearing was held to determine the defendant's parole status, and the State presented evidence that the

defendant was on parole in a Graham County case, but no evidence that he was on parole in the Pima County case. When the trial court pointed this out to the prosecutor, the prosecutor moved to amend the allegation to charge that the defendant was on parole in the Graham County case. The trial court refused to grant the motion to amend and the State appealed. The Arizona Supreme Court found that the trial court was within its discretion in denying the motion to amend because the State never gave the defendant notice that he would have to defend against a charge that he was on parole in Graham County.